

Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**

EVER HIGGINS,

*Petitioner,*

v.

TYSON FOODS, INC.

On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eleventh Circuit

**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

Under what circumstances, if any, may a plaintiff establish the existence of invidious discrimination in employment by adducing evidence that he or she was better qualified than the individual selected for a disputed position?\*

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\* The same question is presented in *Ash v. Tyson Foods, Inc.*, No. 05-379.

## **LIST OF PARTIES**

The parties to this action are set forth in the caption.

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**PETITION FOR A WRIT OF CERTIORARI**

Petitioner Ever Higgins respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on April 15, 2005.

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**OPINIONS BELOW**

The April 15, 2005 opinion of the court of appeals, which is reported at 143 Fed. Appx. 300 (Table) (11th Cir. 2005), is set out at p. 1a of the Appendix. The July 25, 2005 order of the court of appeals, which is not officially reported, is set out at pp. 112a-113a. The September 2, 2004 memorandum decision of the district court, which is not officially reported, is set out at pp. 2a-111a.

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**STATEMENT OF JURISDICTION**

The decision of the court of appeals was entered on April 15, 2005. A timely petition for rehearing was denied on July 25, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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**STATUTES INVOLVED**

Section 703(a)(1) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides in pertinent part:

- It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such

individual's race, color, religion, sex, or national origin.

Section 1981 of 42 U.S.C. provides in pertinent part:

- (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .
- (b) For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

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### STATEMENT OF THE CASE

This case concerns a promotion decision that was made in the summer of 2000 to the position of Complex Human Resources Manager at the Oxford, Alabama regional complex office of Tyson Foods. At the time petitioner, Ever Higgins, an African American female and 49 years of age, was a managerial employee in human resources at the complex level. The position was ultimately awarded to Lisa Burdick, white female and 28 years of age. Plaintiff sued alleging discrimination on the basis of her age and race.

After a period of discovery, Tyson moved for summary judgment arguing that Higgins must "adduce evidence that the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." (Doc. 44, p. 37) (boldface and underline in original).

Tyson relied on Eleventh, Tenth, and Fifth Circuit case law.<sup>1</sup> Higgins, in her opposition, submitted evidence on a range of conflicting issues, but most important was conflicting evidence regarding whether Higgins clearly was better qualified than Burdick and whether Burdick even met the minimum qualifications for the position.

There was substantial evidence that Higgins was far better qualified than Burdick. Higgins was Burdick's supervisor for over a year and had trained Burdick in human resources. (Doc. 44, Ex. D, pp. 20-21; Ex. F, pp. 50-51, 56; Pls. Exs. 1, 3, 4). Allan Trotter, the Complex Human Resource Manager, told Higgins, as human resource manager, to "take her [Burdick] and use her however you can, train her what to do." (Doc. 44, Ex. F, p. 51).

In the evidence submitted to the district court was an extensive list of Higgins' job duties and responsibilities compared to those of Burdick during their respective tenure with Tyson. Higgins also relied on the job posting for the human resource position which provided the minimum qualifications. (Doc. 44, Ex. F, Pls. Exs. 5, 7). Higgins greatly exceeded the minimum qualifications. (Doc. 44, Ex. F., p. 105).<sup>2</sup> Higgins pointed to her fifteen years of management experience in the field of Human

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<sup>1</sup> *Cofield v. Goldkist, Inc.*, 2001 WL 1159775 (11th Cir. Ala. Oct. 2, 2001) (emphasis added) citing *Denney v. City of Albany*, 247 F.3d 1172 (11th Cir. 2001) quoting *Lee v. GTE Florida Inc.*, 226 F.3d 1249, 1253-54 (11th Cir. 2000); accord, *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1339-1340 (11th Cir. 2000) (all quoting *Deines v. Texas Dep't of Protective & Reg. Servs.*, 164 F.3d 277, 280 (5th Cir. 1999)).

<sup>2</sup> Allan Trotter, Complex Human Resource manager, testified that the Complex position requires three to five years of management experience not merely time with the company. (Doc. 44, Ex. F., pp. 5, 61-64).